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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

# No. 26

SOUTHERN RAILWAY COMPANY, APPELLANT,

*vs.*

COMMONWEALTH OF VIRGINIA AT THE RELATION OF H. G. SHIRLEY, STATE HIGHWAY COMMISSIONER OF VIRGINIA, APPELLEE.

## BRIEF FOR APPELLEE.

The opinions below afford excellent briefs for appellee, the one by the Supreme Court of Appeals of Virginia being clear and succinct, the one by the *nisi prius* court (the Virginia State Corporation Commission), elaborate and exhaustive. We invite special attention to the latter, which was prepared with skill and patience by a profound student of the law, William Meade Fletcher, the author of the authoritative and encyclopedic textbook, Fletcher on *Corporations.*

It is true, as appellant justly states in its brief in opposition to appellee's Motion to Dimiss or Affirm, that the merits of this case have already been discussed in the re-

spective statements of the parties; that is to say, in our Statement Opposing Jurisdiction and our Motion to Dismiss or Affirm, on the one hand, and at more elaborate length in the appellant's Brief in Opposition to that statement and motion.

In view of this fact the appellee requests that the Court consider his Statement Opposing Jurisdiction and his Motion to Dismiss or Affirm as a part of this brief on the merits; it is not our intention here to repeat what has there already been said, except so far as may be necessary for the sake of connection.

**Appellee's Objections to the Statement of the Federal Question as Made by the Appellant on Page Three of Its Brief.**

We take serious exception to the form and method in which the appellant has undertaken on page 3 of its brief to state the Federal constitutional question here involved. Our objection to the question as there stated goes not only to inaccuracies in detail but to the entire form and approach.

The delegation is there said to be to an "*individual*" administrative officer; that this individual officer is empowered to determine that a certain crossing is to be eliminated; and further that he is to determine without notice of hearing *the manner* in which it should be eliminated, namely, *by a highway overpass*. The question as stated by our opponents further refers to the determination by this individual as "*personal*" as well as "*ex parte*." We do not at all concur in these statements.

The appellee respectfully submits that our opponents' method of stating the question fails to take into account several considerations to which we have already called

attention and to which other references will be made hereafter, namely:

(1) No allusion is made to the legislative policy of the Commonwealth of Virginia against grade crossings which was adopted some thirty years ago and declares in terms that the policy of Virginia is to eliminate all grade crossings wherever reasonably practicable. This policy is referred to in the decision of the Supreme Court of Appeals of Virginia; 167 S. E. Adv. Sh. No. 6, at page 579; Record, 133. All grade crossings are by this legislative policy potentially prohibited; by which we mean that their abolition accords with the Virginia law and the elimination of all would be accomplished except for practical and financial considerations which necessarily render the elimination a slow process, beginning with the most dangerous and inconvenient crossings (especially those on main arteries of traffic) and progressing gradually as times and conditions may warrant with the abolition of others as to the Highway Commissioner may seem best, having regard to the public safety and convenience.

(2) The question as stated by our opponents ignores the fact that the delegation of administrative discretion is not to an individual in his personal capacity, as our opponents say or intimate, but the discretion delegated is to *a Department of the State Government;* an arm of the Commonwealth, as the opinion of the Corporation Commission phrases it; an administrative department of the State, as the decision of the Supreme Court of Appeals of Virginia puts it. This consideration is not only ignored in the statement of the question by our opponents but they improperly designate the Highway Commissioner as *an individual* and his opinion on the question as his *personal* opinion. Further on in their brief, at page 18, they become more

rhetorical and refer to his opinion as "*arbitrary*" and "*purely personal*" and his action as an "*arbitrary fiat.*"

(3) Opponents' statement of the question wholly ignores the fact that the delegated discretion is to be exercised under a legislative guide or standard expressly laid down in the statute as a basis for the official action of the Highway Department. Under this statute there is to be nothing arbitrary or personal about the discretion delegated; on the contrary, it is to be exercised officially, and the public safety and convenience is laid down as the test, guide or standard under which the delegated discretion is to be exercised.

(4) The question as stated by our opponents ignores also the provisions of Section 164 of the Constitution of Virginia prescribing that the right of the Commonwealth, *through such instrumentalities as it may select,* to define the public duties of common carriers, shall never be abridged. This section of the Virginia Constitution is cited and quoted on page 582 of the published decision of the Supreme Court of Appeals of Virginia; Record 140.

(5) Appellant's statement of the question also ignores the consideration that the right of the railroad to propel its trains at high speed over public highways at grade is not a common or ordinary right such as is inherent in all citizens, but is a special privilege conferred by the Commonwealth *ex gratia.* Our opponents suggest the erroneous idea that the Commonwealth of Virginia desires to treat railroads as *caput lupinum,* whereas the simple fact is that the Commonwealth has elected, under a legislative policy long established, to take back from the railroads, gradually and as conditions may warrant and the public safety and convenience may require, a special and extraordinary privilege which they have heretofore enjoyed, partaking in no way of the nature of an inherent right.

Having regard to the foregoing considerations in the background, we shall now endeavor to make a restatement of the Federal constitutional question here involved:

**The Federal Constitutional Question Restated.**

Bearing in mind the provisions of Virginia Constitution Section 164, and the legislative policy of Virginia against railroad-highway grade crossings, which were originally permitted and now exist not by inherent right but by special privilege—is a statute violative of the due process clause of the Fourteenth Amendment because, in the exercise of the police power, it delegates to an administrative department of the Commonwealth, when in the official opinion of that department the public safety and convenience require the elimination of a particular grade crossing, discretion and power to ascertain such state of facts and direct the elimination of such grade crossing, at the equal cost of the railroad and the Commonwealth, without notice to the railroad or an opportunity to be heard on the point; the design and manner of elimination, and the method and details of construction, having regard to the cost, however, being the subject of a judicial hearing expressly provided for after due notice, if the department and the railroad are unable to agree on these points?

**The Two Branches of Appellant's Attack.**

We have stated the two branches of the appellant's attack upon this statute on pages two and three of our Statement Opposing Jurisdiction, the first being that legislative powers of this character cannot be delegated, and the second, that no provision is made for notice and a hearing.

On the question of the propriety of the delegation we think it plain, in view of the authorities there cited by us, that no Federal question is involved. If the Commonwealth of Virginia has the right through any branch of its government, by any exertion of its sovereign power, to order the abolition of a grade crossing, then, from the standpoint of

the Federal Constitution, it is wholly immaterial whether this be done by direct legislative enactment or by delegation to an subordinate board. The right to delegate is not only reserved by Section 164 of the Constitution of Virginia, but the absence of any Federal question in this regard is plainly shown by the quotations from two decisions of this Court we cited, namely:

*Prentis* v. *A. C. L.*, 211 U. S. 210, 225;
*Erie R. R. Co.* v. *Public Utilities Commrs.*, 254 U. S. 394, 413.

Upon the second point of attack, namely: That no provision is made for notice and a hearing, we again refer the Court to our Statement Opposing Jurisdiction, pages 5 to 8.

**Appellant's Significant Admission.**

The admission by the appellant, to which we refer on page 5, that the *legislature* of the Commonwealth could make a *direct* determination to eliminate a grade crossing without notice or an opportunity to be heard, is significant and pertinent. As we there stated, the admission was made throughout the briefs below, and is referred to in the opinions both of the Corporation Commission and of the Supreme Court of Appeals of Virginia. We note with interest that the admission is now again made in appellant's brief in this Court; see especially the paragraph at the bottom of page 5 of appellant's brief, and again in connection with the strained effort on page 36 to distinguish the case of *Health Department* v. *Trinity Church*, 145 N. Y. 32.

If the Commonwealth of Virginia can through any instrumentality or by any means without notice or a hearing decree the elimination of a grade crossing,—if the Commonwealth can in the exercise of the police power in the interest of public safety exert this pressure upon the railroad without affording it notice and a hearing,—then it is

difficult for us to understand how any Federal question is injected by reason of the fact that the Commonwealth has adopted what to it seems the most convenient method of exerting the police power, without notice or a hearing. The rights of the Commonwealth under the police power cannot rise above the Federal Constitution. There must be a direct substantial relation between the public welfare and the regulation sought to be enforced. And the means adopted to procure this must be reasonable and not confiscatory.

If the above requirements are met it is no concern of the Federal Government, no matter of constitutional law under the Federal constitution, just *how* the regulation is made operative, whether by direct legislation or by delegation.

If the Commonwealth of Virginia can under the Federal Constitution in any fashion order the elimination of a grade crossing without notice and a hearing, then it is certainly at liberty to accomplish this in any form or manner which to it may seem best suited to the circumstances without impinging upon the inhibitions of the Federal Constitution.

The admission of our opponents thus repeatedly made that the Commonwealth of Virginia could accomplish this result by direct legislation of its General Assembly, is an admission that there is nothing in the Federal Constitution to prohibit such procedure. And this for the reason that if the Fourteenth Amendment of the United States Constitution does in fact require notice and a hearing as a part of due process of law in this class of cases, then it is required as much of the General Assembly of Virginia as it is required of any other instrumentality of the Commonwealth.

It has always appealed to us as a necessary corollary of this admission of the appellant, which the direct authorities

have compelled it to make, that no question under the Federal Constitution is or can be left in the case. The admission is tantamount to saying that there is no Federal question here, and the appellant's case must fall.

**Enforcement of a Police Regulation Involves no Taking of Property.**

We have pointed out in our Statement Opposing Jurisdiction and in our Motion to Dismiss or Affirm that this is a mere police regulation and does not involve the *taking* of any property, reference being made to the opinion of the Supreme Court of Appeals of Virginia and the authorities cited, Record 141. The authorities are cited on pages 8 and 9 of our Statement Opposing Jurisdiction and will be found elaborated in the opinion of the Corporation Commission in this case on pages 52 *et seq* of the Record.

It is respectfully submitted that the legal principles to be applied in determining whether or not the requirements of due process, or the law of the land, have been met can hardly be better or more simply stated, than in Cooley's Const. Lim. (8th Ed.), pages 740, 741:

> "The principles, then, upon which the process is based are to determine whether it is 'due process' or not, and not any considerations of mere form. * * * *When the government through its established agencies interferes* with the title to one's property, *or with his independent enjoyment of it* and its action is called in question as not in accordance with the law of the land, we are to test its validity by those principles of civil liberty and constitutional protection which have become established in our system of laws, and not generally by rules that pertain to forms of procedure merely. In judicial proceedings the law of the land requires a hearing before condemnation, and judgment before dispossession; but when property is appropriated by the government to public uses, or the

> legislature interferes to give direction to its title through remedial statutes, *different considerations from those which regard the controversies between man and man must prevail,* different proceedings are required, and we have only to see whether the interference can be justified by the established rules applicable to the special case. DUE PROCESS OF LAW IN EACH PARTICULAR CASE MEANS, SUCH AN EXERTION OF THE POWERS OF GOVERNMENT AS THE SETTLED MAXIMS OF LAW PERMIT AND SANCTION, AND UNDER SUCH SAFEGUARDS FOR THE PROTECTION OF INDIVIDUAL RIGHTS AS THOSE MAXIMS PRESCRIBE FOR THE CLASS OF CASES TO WHICH THE ONE IN QUESTION BELONGS." (Italics and capitals supplied.)

We say there is a vast difference between what is required for the due process of law in ordinary cases between man and man and in proceedings where the Government itself through any of its agencies is exerting the police power. This point is adequately discussed in the opinion of the Corporation Commission beginning on page 63 of the record and it would serve no good purpose to repeat the analysis and the quotations in this brief. We will content ourselves with a reference to that opinion.

**The Legislative Policy and Guide.**

Though we submit that the point is not pertinent to the incidence of the Fourteenth Amendment of the United States Constitution, yet it should be pointed out in this case that there has been no delegation of any personal or arbitrary power to an individual without legislative guide. The delegation is to a state department. The delegation confers power to determine officially a state of facts, upon the ascertainment of which the operation of the established policy and law of the Commonwealth of Virginia depends. The discretion is to be exercised under the express terms of the statute in accordance with a legislative guide or standard there set up, namely: the requirements of public

safety and convenience. It is true that this legislative guide is expressed in general terms. It is also true that the laying down of a legislative guide in general terms is quite sufficient to prevent the discretion from being characterized as personal or arbitrary.

The distinction between arbitrary discretion and discretion under legislative guide is strikingly brought out in the case of *Thompson* v. *Smith*, 155 Va. 367. The question in that case was the constitutionality of an ordinance in the City of Lynchburg which undertook to delegate to the chief of police power to issue a permit to drive automobiles to persons over sixteen years of age who upon examination could demonstrate ability and knowledge to qualify them "in the judgment of the chief of police." The ordinance also authorized the chief of police to revoke the permit of any driver "who in his opinion becomes unfit to drive an automobile." It will be observed that *quoad* the granting of the permit there was a very general legislative guide or standard under which the chief of police was directed to act, but in the provision of the ordinance concerning the revoking of permits there was no legislative standard whatever.

The Court, after an elaborate discussion of what powers could and what powers could not be delegated, says on page 383:

> "The ordinance here in question declares the policy of the law and fixes the legal principles which are to control the chief of police in *granting* a driving permit. The applicant must demonstrate his ability to safely and properly operate motor vehicles upon the streets of the city, and demonstrate that he knows the traffic laws of the State and the city, and shall be sixteen years of age or over. While the ordinance provides that no permit shall be issued to the applicant unless his examination by the chief of police shall disclose that he possesses such ability and knowledge '*as in the judgment* of the chief of police qualifies such person to re-

ceive such permit,' the discretion here vested in the chief of police is *essentially ministerial and not legislative.*

"But when we come to examine the provisions with reference to *revocation* of permits by the chief of police the policy of the law and the legal principles which are to control the action of the chief of police are not determined or determinable from the terms of the ordinance." (Italics supplied.)

So also in the case of *Mutual Film Corporation* v. *Ohio Industrial Commission*, 236 U. S. 230, the point was whether a statute of Ohio was constitutional. The statute was attacked because it denied due process of law in that it attempted to delegate legislative power to a board of censors without prescribing a standard to be followed and without providing for a judicial determination.

This statute provided that the board of censors should examine motion picture films and that "only such films as are in the judgment and discretion of the board of censors of a moral, educational or amusing and harmless character shall be passed and approved by such board" (236 U. S. at page 240):

It will be observed how general is the legislative guide or standard laid down under which the board of censors was to act; yet said the Court, in the opinion by Mr. Justice McKenna, at pages 245 and 246:

"The next contention of complainant is that the Ohio statute is a delegation of legislative power and void for that if not for the other reasons charges against it; which we have discussed. While administration and legislation are quite distinct powers, the line which separates exactly their exercise is not easy to define in words. It is best recognized in illustrations. Undoubtedly the legislature must declare the policy of the law and fix the legal principles which are to control in

given cases; but an administrative body may be invested with the power to ascertain the facts and conditions to which the policy and principles apply. If this could not be done there would be infinite confusion in the laws, and in an effort to detail and to particularize, they would miss sufficiency both in provision and execution.

"The objection to the statute is that it furnishes no standard of what is educational, moral, amusing or harmless, and hence leaves decision to arbitrary judgment, whim and caprise; or, aside from those extremes, leaving it to the different views which might be entertained of the effect of the pictures, permitting the 'personal education' to enter, resulting 'in unjust discrimination against some propagandist film,' while others might be approved without question. But the statute by its provisions guards against such variant judgments, and its terms, like other general terms, get precision from the sense and experience of men and become certain and useful guides in reasoning and conduct. The exact specification of the instances of their application would be as impossible as the attempt would be futile. Upon such sense and experience, therefore, the law properly relies. This has many analogies and direct examples in cases, and we may cite *Gundling* v. *Chicago*, 177 U. S. 183; *Red 'C' Oil Manufacturing Co.* v. *North Carolina*, 222 U. S. 380; *Bridge Co.* v. *United States*, 216 U. S. 177; *Buttfield* v. *Stranahan*, 192 U. S. 470. See also *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86. If this were not so, the many administrative agencies created by the state and National governments would be denuded of their utility and government in some of its most important exercises become impossible.

"To sustain the attack upon the statute as a delegation of legislative power, complainant cites *Harmon* v. *State*, 66 Ohio St. 249. In that case a statute of the State committing to a certain officer the duty of issuing a license to one desiring to act as an egnineer if 'found

trustworthy and competent', was declared invalid because, as the court said, no standard was furnished by the General Assembly as to qualification, and no specification as to wherein the applicant should be trustworthy and competent, but all was 'left to the opinion, finding and caprice of the examiner.' The case can be distinguished. Besides, later cases have recognized the difficulty of exact separation of the powers of government, and announced the principle that legislative power is completely exercised where the law 'is perfect, final and decisive in all of its parts, and the discretion given only relates to its execution.' Cases are cited in illustration. And the principle finds further illustration in the decisions of the courts of lesser authority but which exhibit the juridical sense of the State as to the delegation of powers."

We submit that the legislative guide or standard laid down in the Lynchburg ordinance in the *Thompson case, supra,* and that laid down in the Ohio statute in the *Mutual Film case, supra,* were not in any respect more specific or detailed than the legislative guide and standard laid down in the Virginia statute here under attack. In all three cases the standard was expressed in very general terms but the policy of the law and the legislative intent is plainly and sufficiently expressed.

Our opponents on page 35 of their brief in opposition to our motion to dismiss or affirm, say that the case of *Chi., M. & St. P. R. Co.* v. *Board of Railroad Commrs.,* 76 Mont. 305, 347 Pac. 162, is very interesting and that in that case the Montana Court held unconstitutional "an entirely analogous statute." We submit that there is no similarity in the case and no analogy in the statute involved. The case concerned additional trackage and involved a *taking* of property. The statute in the Montana case delegated arbitrary discretion without any suggestion of legislative guide. The opinion of the Montana Court itself emphatically points

out the clear distinction between that case and the instant case when it uses the following language:

> "The statute does not undertake, *even in the most general terms*, to prescribe conditions under which the board may compel the carrier to construct a spur. *It does not provide* that the board may issue its order *when reasonable public necessity requires it; there is no indicated rule or decision.*"
>
> "The board's order to the carrier to construct the spur track is in effect *a taking of property.*" (Italics supplied.)

**Discussion of Grade Crossing Elimination Cases.**

We have on pages 18 and 19 of our Statement Opposing Jurisdiction and Motion to Dismiss or Affirm cited without comment the grade crossing cases which have been passed on by this Court. We shall now undertake to point out in more detail the bearing of these cases upon the instant case and endeavor to show that argument by analogy is not necessary here, and this for the reason that principles and doctrines long settled by the decisions *in this particular class of cases* are determinative of the instant case and if applied will require an affirmance of the decision of the Supreme Court of Appeals of Virginia.

The first of such cases to which our attention has been called reached this Court in the year 1894, and has been later referred to as one in which the subject was elaborately considered:

*New York, &c., Rwy. Co.* v. *Bristol*, 151 U. S. 556.

A Connecticut statute enacted in 1889 delegated to railroad commissioners power to eliminate grade crossings at the sole expense of the railroads. Acting under this statute the commissioners directed the elimination of a certain grade crossing in the town of Bristol.

It was urged among other things that this amounted to taking the property of the railroad without due process of law, to which reply was made that the right to amend the charter of the railroad was reserved by the State and that the railroad had had a hearing. To this it was said by counsel on behalf of the railroad (151 U. S. at page 564):

> "But before the hearings began at all, it was settled by the prejudgment of this extraordinary board of three men, that this particular one among the more dangerous crossings was the one to be removed and, as a necessary consequence under the law, that no matter how much of the danger at the crossing is created by the condition of the adjoining highways for which the town of Bristol is alone responsible,—no matter even, if, on investigation, it could be shown that in this case the railroad company is not responsible for any of the danger at the crossing, nevertheless, the railroad company is to pay for the whole work ordered."

The only questions on which there had been a hearing were how and in what manner the highway should be carried over or under the railroad, and whether the railroad's financial ability warranted the requirement. The foregoing from the contention of counsel for the railroad is very apt to the instant case. For here also appellant takes the position that the railroad is entitled to notice and a hearing on the question whether or not the particular grade crossing shall be eliminated.

It appears also in that case that the railroad was required to do work entirely outside of the limits of its own right-of-way in order to make comfortable grades. This is not true in the instant case. Counsel for the railroad concluded with a contention almost identical with appellant's contention here (151 U. S. at page 565):

> "It seems to the plaintiff that, when it is denied a hearing as to all the matters of primary importance, it

> is a hollow mockery to talk about its having its day in court, because it is allowed to be heard on a question so narrowed as merely to mean whether it can get money to pay this bill, or because its engineers are allowed to suggest modifications of the plans presented, so as to obviate the ordering of impracticable railroad construction."

So much for the contentions of the railroad. To elaborate the pertinency to the instant case would be to labor the obvious.

The unanimous opinion of the Court was rendered by Chief Justice Fuller. It overruled all the objections and contentions of the railroad, and held the Connecticut statute constitutional and the acts of the railroad commissioners thereunder valid. The constitutional point had not been made originally but was brought in by amendment of the errors assigned, as to which this Court said (p. 565):

> "This tardiness in bringing the contention forward is perhaps not to be wondered at in view of the repeated adjudications of the Supreme Court of Connecticut sustaining the constitutionality of similar laws, as well as of this particular statute, and of the rulings of this court in reference to like legislation."

The following passages are quoted from the opinion, on the pages indicated:

> "It must be admitted that the act of June 19, 1889, is directed to the extinction of grade crossings as a menace to public safety, and that it is therefore within the exercise of the police power of the State * * *" (page 566).
>
> "* * * That the legislature of this State has the power to do all this, for the specified purpose, and to do it through the instrumentality of a commission, it is now only necessary to state, not to argue * * *.
>
> "It is likewise thoroughly established in this Court that the inhibitions of the Constitution of the United

States upon the impairment of the obligation of contracts, or the deprivation of property without due process or of the equal protection of the laws, by the States, *are not violated by the legitimate exercise of legislative power in securing the public safety, health and morals.* The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied inability to governmental regulation in particulars essential to the preservation of the community from injury" (page 567).

"The objection is not that hearing was not required and accorded, which it could not well be in view of the protracted proceedings before the commissioners and the Superior Court and the review in the Supreme Court, but that the scope of inquiry was not as broad as the statute should have allowed, and *that the particular crossing to be removed was authorized to be prejudged.*" (Italics supplied.) (Pages 568-9.)

The conclusions of the Court were as follows:

"The conclusions of this Court have been repeatedly announced to the effect that though railroad corporations are private corporations as distinguished from those created for municipal or governmental purposes, their uses are public, and they are invested with the right of eminent domain, only to be exercised for public purposes; that therefore they are subject to legislative control in all respects necessary to protect the public against danger, injustice, and oppression; that the State has power to exercise this control through boards of commissioners; that there is no injust discrimination and no denial of the equal protection of the laws in regulations applicable to all railroad corporations alike; nor is there necessarily such denial nor an infringement of the obligation of contracts in the imposition upon them in particular instances of the entire expense of the performance of acts required in the public interests, in the exercise of legislative discretion; or are they thereby deprived of property without

due process of law, by statutes under which the result is ascertained in a mode suited to the nature of the case, and not merely arbitrary and capricious; and that the adjudication of the highest court of a State, that, in such particulars, a law enacted in the exercise of the police power of the State, is valid, will not be reversed by this court on the ground of an infraction of the Constitution of the United States. (Citing cases.)" (Italics supplied.) (Page 571.)

It will be seen therefore that in this early case the constitutionality of the statute was unsuccessfully attacked on both grounds urged at this late day in the demurrer in the instant case.

The appellant is confronted with the judicially recognized danger incident to grade crossings. This is a matter of common knowledge, and courts even in the absence of legislation will recognize that such crossings are always a menace to public safety. This is especially true when the highway involved is a main artery of traffic. The direct relation between the police regulation and the public safety and welfare is obvious. We do not have to stretch the imagination to find that direct and pertinent bearing which such regulations must have to the safety of the public. Many police regulations have been upheld where this connection, which is essential to the validity of all police measures, has been tenuous, if, indeed, we may say fanciful. Defendant can make no such contention here, the relationship being direct and immediate, plain and obvious.

That the expense is out of all reasonable proportion to the anticipated public benefit will be difficult if not impossible to establish, in view of the fact that the State itself will bear its full one-half share of such expense. This being so, heavy indeed will be the burden of the appellant to show that there is anything unreasonable or arbitrary in the requirement that the grade crossing be eliminated. The State

is not requiring the railroad to use its funds alone in order to accomplish some fanciful public good. The good faith of the State and of the Highway Commissioner is vouched for by the fact that the State itself shares the cost, dollar for dollar, with the railroad.

In the same year (1894) we find an interesting annotation appended to the report of the case of *Kelly* v. *Minnesota* (Minn.) 26 L. R. A. 92, under the title: "*Liability for cost of changing grade or street to prevent the crossing of a railroad at grade.*"

This note is interesting as indicating some of the earlier conceptions of the basis in law justifying the elimination of grade crossings at the expense, total or partial, of the railroads, and the growth of judicial ideas upon the subject, paralleling the expansion of the police power.

The annotator states at the outset that the power of the legislature in this respect seems to be absolute, *in the absence of some charter contract.* It is now well recognized that no charter contract can interfere with the exercise of the police power, that the State or municipality cannot by contract or in any other manner divest itself of any part of its police power.

The annotator also intimates that there is or may be a difference between eliminating an *existing* crossing and requiring separation of grades *at the time of the construction* of the railroad; he says that where a new street is opened across an existing railroad the grades must be separated at the expense of the municipality. The distinction between proposed and existing grade crossings no longer exists. It is now clear that the municipality would not have to bear the expense of carrying the new highway over the railroad.

The annotator also refers to the reserved power in the State to amend a railroad charter, which was then supposed to have some bearing upon these questions. No such basis of regulation is now required or even deemed pertinent.

These suggested bases of governmental power, and these distinctions as to when and how such power may be exercised, are now recognized to be aside from the mark. The power of the State, either directly or through its boards and commissions, to require the elimination of grade crossings at the expense of the railroads is now recognized to be simply an exercise of the police power, inherent in sovereignty—a power which the sovereign itself cannot abdicate or limit. Nowadays the only open questions are: *First.* Is there a real connection between the proposed change and the public safety or welfare? *Second.* Is the requirement so arbitrary, unreasonable and out of all proportion to the good to be accomplished that the regulation amounts to confiscation?

The connection between eliminating a grade crossing and the public safety is manifest and obvious. The courts take judicial notice of this menace and the policy of the Commonwealth was announced by the General Assembly a generation ago and has long been recognized by the courts. So the first question passes out of the picture where a grade crossing is concerned.

This being so, the second question likewise passes out of the picture in the instant case—if not for good and all, certainly so far as the demurrer is concerned.

*Chicago, &c., Rwy. Co.* v. *Nebraska*, 47 Neb. 549, 41 L. R. A. 481.

In the year 1896 the Supreme Court of Nebraska decided this grade crossing case and upon its affirmance by the Supreme Court of the United States it has become a leading authority in settling important principles of constitutional law.

The City of Omaha by ordinance required the railroad to repair a certain portion of a viaduct at its own expense.

The most important objection made by the railroad (so stated on page 484 of the L. R. A. report) was that the ordinance took the property of the railroad without due process of law and impaired the obligation of the contract with the city under which the track was laid and the viaduct constructed.

The court held that the purpose of the legislation—that is to say, the general State law under which the ordinance was enacted—was "to promote the convenience and safety of the public at a grade crossing, *which is judically recognized as a place of danger.*" The question was whether there was a legitimate exercise of the police power of the State.

The railroad *claimed* that the proceeding by the mayor and council which determined the necessity of repairing the viaduct was "essentially judicial in character" (page 484 of the L. R. A. report). And the railroad also *claimed* that "such a proceeding, *without notice* to those concerned, and *without giving them an opportunity to be heard,* violates every maxim and principle of constitutional government."

But the court held:

> "The doctrine is now firmly established, although after some diversity of opinion, that previous notice, and an opportunity to be heard, by persons thereby affected, is not indispensable to a valid exercise of the police power" (page 484 of the L. R. A. Report).

In support of this doctrine, the court cites and quotes from *Woodruff* v. *Catlin,* 54 Conn. 295, which was a case of separating the grades of two railroads at an intersection, at the expense of the railroads; the court held that the State had power to require such separation and that the power could be exercised "through the instrumentality of a commission."

The court also cited *New York, &c., Appeal,* 58 Conn. 532, where a similar discretion had been delegated to *a commissioner:*

> "This exercise of power is justifiable on the ground that government itself, in the discharge of its governmental duties, undertakes to remove the danger; and does it in the same manner, and *through the same instrumentality,* that it provides and maintains highways through, and at the expense of, the towns and other corporations * * * railroad companies, in some sense, are but the agents of government, in affording to the public a more expeditious and vastly improved method of travel * * *. They contribute largely to the danger, and the State may well require them to contribute largely to its removal."

The same doctrine was re-asserted by the same court in 62 Conn. 527, and affirmed by the Supreme Court of the United States.

Also *Train* v. *Boston, &c. Co.,* 144 Mass. 529; 59 Am. Rep. 115; which upheld a regulation of a board of health, passed by delegated authority, requiring disinfecting in certain cases at the owner's expense, without any opportunity for a hearing or for any review in the courts.

Also *Commonwealth* v. *Roberts,* 115 Mass. 281; 16 L. R. A. 400, upholding a similar regulation requiring sewer connection, there being no provision for notice, hearing or appeal.

Also *State* v. *Missouri, &c., Co.,* 33 Kan. 176, where the court held that no advance notice was necessary, saying:

> "Notice afterwards, with an opportunity on the part of the railroad companies to contest the validity of ordinance, and the right of the city to compel them to construct the viaduct, is sufficient."

Also the leading case of *New York Health Department* v. *Trinity Church,* 145 N. Y. 32, 27 L. R. A. 710. The court

referred to this case as "the clearest and most satisfactory exposition of the subject." This New York case is cited and quoted at length in the opinion of the Corporation Commission in the instant case on page 73 of the record, and we submit that it furnishes a complete answer to both points of objection made by appellant.

This leading Nebraska case, holding that powers of this kind are inherent in the sovereignty of the State and may be asserted either by the legislature directly or by delegation to other agencies, without notice or any opportunity to be heard, was affirmed and the doctrine fully approved by the Supreme Court of the United States in the year 1898 under the style and citation:

*Chicago, B. & Q. R. Co.* v. *Nebraska*, 170 U. S. 57.

The Supreme Court of the United States held that Federal questions were involved, and it being asserted that the obligation of a contract was impaired, it was the province and duty of this Court to determine for itself whether or not such contract existed.

The court was of opinion that the viaduct was constructed pursuant to a certain contract, but that all such contracts, where the safety and welfare of the public are involved, are subject to change by subsequent legislation; that the State could not divest itself of its police power by contract or otherwise; and that the repair or alteration of the viaduct at the expense of the railroad company could be directed by the State through the instrumentality of the city council.

The opinion was delivered by Mr. Justice Shiras and the decision of the highest court of Nebraska, which we have considered at length, was affirmed.

This Court there pointed out the distinction between ordinary contracts between private persons and contracts

made with railroad companies—"where the subject-matter of the contract is one which affects the safety and welfare of the public." As to such public contracts this Court said:

> "The presumption is that when such contracts are entered into it is with the knowledge that parties cannot, by making agreements on subjects involving the rights of the public, withdraw such subjects from the police power of the legislature."

The opinion cites with approval the cases cited by the Nebraska Court. *New York, &c.*, v. *Bristol*, 151 U. S. 556, is referred to as a case in which "the subject was elaborately considered."

The court plainly says that in determining to repair the viaduct the city council was exercising a legally delegated discretion and was not acting *in a judicial manner*. The delegation by the legislature to the city council as an instrumentality was not a direction "*to proceed judicially but to exercise a legally delegated discretion*" (170 U. S., p. 76).

Specifically on the point of notice and an opportunity to be hear, the Supreme Court approved the doctrine announced in *State* v. *Missouri, &c., Railroad*, 33 Kan. 176, and *New York Health Department* v. *Trinity Church*, 145 N. Y. 32, quoting the passage we quoted on page 8 of our Statement Opposing Jurisdiction and stating the decision in the *Trinity Church Case* as follows (italics supplied):

> "*Health Department* v. *Trinity Church*, 145 N. Y. 32, was the case of an action to recover a penalty under a statute requiring all tenement houses to be supplied with water on each floor occupied or intended to be occupied by one or more families, *whenever so directed by the board of health. The statute made no provision for notice* to property holders, and none in fact was given, while it was admitted that it would cost the re-

spondent a considerable sum of money to comply with the order of the board."

The United States Supreme Court quotes from the *Trinity Church Case* as follows:

> "The legislature has power and has exercised it in countless instances to enact general laws upon the subject of the public health or safety *without providing that the parties who are to be affected by those laws shall first be heard* before they shall take effect in a particular case * * *. *The fact that the legislature has chosen to delegate a certain portion of its power to the board of health* * * * would not *alter the principle, nor would it be necessary to provide that the board should give notice and afford a hearing* to the owner before it made such order * * * laws and regulations of a police nature, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbance. *They do not appropriate private property for public use*, but simply regulate its use and enjoyment by the owner. If he suffer injury, it is either *damnum absque injuria*, or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure." (Italics supplied.)

In concluding the opinion in the *Nebraska Case*, Mr. Justice Shiras says that previous notice to the railroad companies was not necessary nor was it necessary that they be invited to participate in the consideration of the proposed change.

Whether or not grade crossings are inherently dangerous in the present state of traffic development is not a judicial matter. The decision to eliminate them when in the opinion of the State Highway Commissioner the public safety or convenience requires, is the announced legislative policy of the Commonwealth of Virginia. All are under the potential

ban of the statute. It being impracticable to abolish all at once, a discretion is delegated to an appropriate public official to determine *when* each particular crossing is to be eliminated, under the guide and by application of the standard laid down by the Virginia statute here under attack. The determination is merely a part of the general police power exercised through the instrumentality of an administrative officer.

This determination is not subject to review by the courts. *If a review were provided for before the courts, the courts in reviewing the decision of the Highway Commissioner would still be acting, not judicially, but in an administrative or ministerial capacity.* This is plainly pointed out in *Thompson* v. *Smith*, 155 Va. 367, as well as by the State Corporation Commission in its opinion in the instant case at page 129 of the record.

Under the Virginia statute the elimination is to be accomplished upon terms more than usually generous to the railroads, for the State bears its full one-half of the entire cost of the work. The railroad is accorded a full opportunity to be heard in the matter of the nature of the proposed new crossing and the details of the plans and specifications. These matters are under the supervision of the State Corporation Commission. So to the natural safeguard against extravagance afforded by the fact that one-half of the expense is to be borne by the State (a very practical and effective protection in itself), the General Assembly has added the supervision of the plans by the Corporation Commission, leaving to it the duty of seeing that no unnecessary work is done and that no unduly elaborate and expensive design is adopted, thus protecting the railroad from disproportionate, unreasonable or arbitrary expenditures.

The following expression from *Missouri &c. R. Co.* v. *May*, 194 U. S. 267, is quoted in the opinion of the Supreme

Court of Appeals of Virginia in the instant case on page 582 (167 S. E. Adv. Shs. No. 6) and is deemed worthy of repetition:

> "Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it *must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.*" (Italics supplied.)

In 1921 the railroads again brought their same objections against grade crossing eliminations before the United States courts, and added the alleged burden on interstate commerce. This was in the case of

*Erie Railway Co.* v. *Commissioners*, 254 U. S. 394.

The Board of Public Utilities Commissioners of New Jersey directed the elimination of fifteen grade crossings. The railroads contended that the order imposed a burden on interstate commerce; that it was wholly unreasonable and arbitrary and therefore violated the due process clause; and that the statute conferred on the Board arbitrary power. The railroads admitted (page 400) that every grade crossing "in the very nature of things is to some extent dangerous to public safety and to some extent impedes public travel."

And on page 406 the following contention on behalf of the railroads is set forth:

> "If an administrative body is given power to determine as a matter of fact what constitutes danger or impediment, and if its conclusion in that respect is binding on the reviewing court, except in a case where there is no evidence whatever to sustain it, then there is no limit to what might be ordered under such a statute, other than the sound discretion of the administrative body to whom is committed this vast power."

The opinion of the court was delivered by Mr. Justice Holmes, who remarks that the elimination of grade crossings is one of the most obvious cases of the exercise of the police power, and says:

> "It is said that if the same requirment were made for the other crossings of the road it would soon be bankrupt. That the States might be so foolish as to kill a goose that lays golden eggs for them, has no bearing on their constitutional rights" (page 410).

On page 412 the opinion states in regard to grade crossings, that "*the situation is one that always is dangerous, and that the Board must be supposed to have known the locality and to have had an advantage similar to that of a judge who sees and hears the witnesses.*"

Also, on the same page:

> "The order should be regarded as stating a condition that must be complied with if the company continues to use the New Jersey soil."

In answer to the objection that the statute left a discretion to the board, this Court makes this most significant statement on pages 412 and 413:

> "Some argument is based upon a discretion supposed to be left to the Board by the statute, which reads that when it appears to the Board that the crossing is dangerous it may order, &c. The State courts seem to regard the words as imposing a positive duty, but upon either construction we perceive no infraction of the company's constitutional rights. If the words are imperative the reasons that we have given apply. If they leave a discretion it is subject to review by the courts, *and this Court has no concern with the question how far legislative or quasi-legislative powers may be delegated to a commission or board.*" (Italics supplied.)

This means, in short, that on the point of propriety of delegation of discretion to boards or officers *the Federal courts are not concerned;* if the power exists in any department of the State to do what has been done as it has been done, then the means by which it is accomplished does not involve any Federal question.

And on this point see also *Bragg* v. *Weaver*, 251 U. S. 57, 58.

It will be noted that this opinion in the *Erie case* upholds the statute and the order of the Board upon the broad ground that *it is an exercise of the legislative police power delegated by the State to the Board.* The case answers the contention of the appellant in its demurrer in the instant case, both on the point of delegation of power and on the point of the lack of notice. It is well recognized that no notice is required to justify a legislative exercise of the police power. That this is true of a direct legislative exercise is admitted even by our opponents, to which admission we have already adverted. That there is no difference in this respect between direct and delegated exercise is shown by the authorities cited in the opinions below, in our Statement Opposing Jurisdiction, and in this brief.

*Durham* v. *Southern R. Co.*, 185 N. C. 240, 35 A. L. R. 1313 (affirmed 266 U. S. 178).

The City of Durham required the railroad to eliminate a grade crossing and to build an underpass. The railroad took the position that an overhead bridge would be more economical than an underpass and that the requirement of the city was unreasonable and expensive as well as a burden upon interstate commerce; also that the ordinance was arbitrary and did not afford due process of law. The railroad urged also that the danger at the crossing, and the

blocking of the crossing by trains, and the necessity for the abolition of the crossing were all issues of fact upon which the railroad was entitled to a jury trial under the North Carolina statute.

In the opinion of Chief Justice Clark it was held that *no issues of fact were raised.* Courts will not interfere with the statutory discretionary powers given to the governing authorities of a town, unless their action is so unreasonable as to be an oppressive and manifest abuse of the discretion, amounting to confiscation.

It was there said that the city's *prima facie* case was made out when it showed the enactment of the ordinance; a presumption arose in favor of the validity of the ordinance and the burden was upon the railroad to show otherwise. The same *prima facie case,* the same presumption, and the same burden, obtain in the instant case. How is it possible to meet such a case, overcome such a presumption, or sustain such a burden by interposing a demurrer?

As the North Carolina court says, on page 1318 of the A. L. R. report:

> "The burden is upon the defendants to show affirmatively that there was an abuse of discretion and that the ordinance was unreasonable and oppressive. The reasonableness of a city ordinance is a question of law for the court. * * *
>
> "There must be sufficient facts alleged to show that the ordinance is unreasonable and oppressivee before it can become an issue of fact for the jury."

This North Carolina case was affirmed by the Supreme Court of the United States; 266 U. S. 178.

*Lehigh Valley R. Co.* v. *Commissioners,* 278 U. S. 24.

In this recent case the opinion was delivered by Mr. Chief Justice Taft. This Court again asserts the power of a state

to delegate to a board the right to require the elimination of grade crossings at the expense of railroads. There is no interference with interstate commerce by requiring such eliminations. It is not to be supposed that the Interstate Commerce Commission is required to make investigation *"into parochial matters like this."*

*New Orleans Public Service* v. *New Orleans* (1930), 281 U. S. 682.

In this case the reverse of the requirement was under investigation. Mr. Justice Butler delivered the unanimous opinion of the court, unholding the validity of an ordinance of the City of New Orleans requiring a street railway company to demolish a viaduct and *to construct grade crossings* in the place of it. The ordinance was held not to violate either the contract or the due process clause. The following is from the opinion of this Court (page 696):

> "The ordinance is presumed to be valid and the burden is upon the appellant to show that, having regard to the facts disclosed by the record, removal of the existing viaduct and construction of the crossings are so clearly unreasonable and arbitrary as to amount to the depriving of appellant of its property without due process of law. * * *
>
> "It is elementary that enforcement of uncompensated obedience to a regulation passed in the legitimate exertion of the police power is not a taking of property without due process of law."

**Analogous Discretion in Condemnation.**

This concludes the examination of the grade crossing cases.

We now call attention to an interesting analogy to be found in another connection in which a discretion has been committed to the State Highway Commissioner by the Gen-

eral Assembly of Virginia, which discretion he exercises without notice or hearing and upon which his decision is conclusive and subject to no review. It is referred to in the opinion of the State Corporation Commission on page 104 of the Record.

To the State Highway Commissioner power is delegated in condemnation proceedings to determine where a road shall be located and what land shall be condemned to provide such location. The conferring of this power upon this official has been approved by the Court in two cases, namely: *State Highway Commissioner* v. *Kreger,* 128 Va. 203, and *State Highway Commissioner* v. *Yorktown Ice and Storage Corp.,* 152 Va. 559.

We submit that the State Corporation Commission is correct in saying that the analogy between the exercise of that discretion and the exercise of the discretion here involved is very close.

The Virginia Court said in the *Kreger case,* 128 Va. at page 227:

> "*The necessity of expediency of the location is a legislative question,* the decision of which, *without judicial review,* has been *delegated* to the State Highway Commission by the statute which we have under consideration. That a condemnation statute is not invalid merely because it delegates the decision as to location to ministerial agents and forbids any judicial review of their action in such matter is well settled by the authorities." (Citing *Wilburn* v. *Gaines,* 111 Va. 334; and *Lake Bowling Alley* v. *Richmond,* 116 Va. 429). "The principles on which these Virginia decisions rest are so fully set out therein that it is unnecessary for us to re-state them here. We are asked to overrule these decisions on the point under consideration, but we have no disposition to do so. *They are impregnably supported both on principle and by authority, and their holding just mentioned is fully approved by us.*" (Italics supplied.)

The general nature of the authority delegated is the same. Its characteristics are not judicial. It involves in a high degree the exercise of discretion. No judicial review is provided for. No notice in advance or opportunity to be heard is provided for. The arbitrary abuse of such delegated and final power might bear very harshly upon the private citizen and his property rights. The only hearing afforded in that case is upon the compensation to be paid for the property taken; just as in the instant case the only hearing is upon the method of accomplishing the separation of grades, having regard to expense.

The same basis of reasoning which sustains the decision in the *Kreger Case* sustains the 1930 grade crossing Act here attacked. Both cases involve the "delegation" of power by the General Assembly to the State Highway Commissioner; and both involve the exercise of that power by him without notice in advance to the property owner affected and without an opportunity to be heard "on the main point"—that is, in the one case, shall the property be taken? and in the other, shall the crossing be eliminated?

To demonstrate further that this analogy is strikingly pertinent we point out that this Court alluded to delegated discretion of this character as proper and distinguished the legal principles involved from those applicable in a rate making case. Just so we distinguish the rate making cases cited by our opponents, and say that the discretion here delegated under a proper legislative guide is very similar to the discretion delegated in the condemnation cases, exercisable without notice or an opportunity to be heard, final and not subject to review by the courts. In *Chicago, Milwaukee, &c., Ry.* v. *Tompkins*, 176 U. S. 167, 173, upon which our opponents rely, Mr. Justice Brewer says that upon questions of policy the conclusions of a legislature are beyond judicial consideration, and, differentiating principles applicable to rate-making cases, adds:

"* * * A single illustration will make this clear: It is within the competency of the legislature to determine when and what property shall be taken for public uses. That question is one of policy over which the courts have no supervision; but if after determining that certain property shall be taken for public uses the legislature proceeds further, and declares that only a certain price shall be paid for it, then the owner may challenge the validity of that part of the act, may contend that his property is taken without due compensation; and the legislative determination of value does not preclude an investigation in the proper judicial tribunals. The same principle applies when vested rights of property are disturbed by a legislative enactment respect to rates."

*Adkins* v. *Children's Hospital*, 261 U. S. 525.

This case is cited and relied on by appellant on pages 22 and 23 of its brief. In an elaborate opinion by Mr. Justice Sutherland an Act of September 19, 1918, appointing a board with power to fix minimum wages for women in the District of Columbia, was held unconstitutional for the reason that it was not a legitimate exercise of the police power. We consider the principles and distinctions there announced so important in the consideration of the instant case as to warrant a somewhat extended comment.

The appellant relies on this case as authority for the proposition that there can be no "legitimate" exercise of the police power by delegation to an administrative officer or board unless due *procedural steps*, consisting of notice and a hearing, are provided for.

Our first comment is that, whatever different views might be entertained as to the bearing of that case upon the instant case, it could not in the most remote way have to do with *procedural* due process. For the court says on page 541 that the procedural steps were enjoined upon the board:

"If it (the board) approve any recommendations it must give public notice of its intention and hold a public hearing at which persons interested will be heard."

So it was not with procedure the court was dealing when it quoted and approved the case of *Lochner* v. *N. Y.*, 198 U. S. 45, in the manner pointed out by appellant at the top of page 23 of its brief.

The case had to do only with *substantive* due process. In the instant case, substantive due process is a *concessum*.

That *the Adkins case* dealt *only* with substantive due process is apparent if the language quoted by appellant be continued as it appears in 261 U. S. at pages 548, 549, 550:

"* * * The claim of the police power would be a mere pretext—become another and delusive name for the supreme sovereignty of the State to be exercised free from constitutional restraint. * * *"

"It is a question of which of two powers or rights shall prevail—the power of the State to legislate or the right of the individual to liberty of person and freedom of contract. The mere assertion that the subject relates, though but in a remote degree, to the public health does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor."

"We think the limit of the police power has been reached and passed in this case. There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health or the health of the individuals who are following the trade of a baker."

"Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may

> labor to earn their living, are mere meddlesome interferences with the rights of the individual and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with, unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health or to the health of the employes, if the hours of labor are not curtailed."

We submit that the above continuation of the language quoted by appellant shows that it has been altogether misapplied by our opponents in the instant case. It has nothing to do with *procedural* due process. It is one of the landmarks in the wilderness of the law through which is to be traced that elusive and shifting boundary line between proper and improper attempts to exercise the *substantive* police power.

The appellee has never at any time, by "revival" of "the old idea" (if there ever was such) or otherwise, suggested that the police power of a state "is wholly unrestrained by the Fourteenth Amendment." We have repeatedly said that two things, and only two, are required to *afford* due process of law *in compliance with the demands* of the Fourteenth Amendment in order to render the exertion of the police power legitimate:

> 1. There must be a real and direct connection between the regulation and the public safety, health, morals or welfare—substantial and not tenuous or fanciful; and
>
> 2. The regulation must not be so unreasonable and arbitrary, so out of all proportion to the necessities of the situation, as to amount to spoilation or confiscation.

The vice in the Act under consideration in *the Adkins case* was that it did not meet these two requirements. There

was not a direct relation, as a means to an end, nor was the end itself appropriate and legitimate.

And there was another vice that was pertinent there but irrelevant here, namely, there was no legislative standard or guide whatever under which the delegated authority was to be exercised. This was a pertinent point in that case because the Act concerned Federal territory, the District of Columbia. But, as we have so often said, in the instant case the question is not a Federal one, for if Virginia can require the elimination of grade crossings in any fashion whatever, then, so far as the Federal Constitution is concerned, the form and manner of accomplishing the object is immaterial. (See quotations from *Prentis* v. *A. C. L.*, 211 U. S. 210, 225, and *Erie* v. *Pub. Util. Comrs.*, 254 U. S. 394, 413, in our Statement Opposing Jurisdiction pages 4 and 5.)

That these were the vices in the Act involved in the *Adkins case* is clearly shown by the following from the opinion in that case:

> "* * * The relation between earnings and morals is not capable of standardization. It cannot be shown that well-paid women safeguard their morals more carefully than those who are poorly paid. Morality rests upon other considerations than wages, and there is, certainly, *no such prevalent connection between the two as* to justify a broad attempt to adjust the latter with reference to the former. As a means of safeguarding morals the attempted classification, in our opinion, is *without reasonable basis.*"
>
> "The feature of this statute, which perhaps more than any other, puts upon it the stamp of invalidity, is that it exacts from the employer an *arbitrary* payment for a purpose and *upon a basis having no causal connection with his business, or the contract or the work the employee engages to do.*"
>
> "The *standard* furnished by the statute for the guidance of the board is so vague as to be impossible of practical application with any reasonable degree of accuracy." (Italics supplied.)

It so happens that *the Adkins case* also affords a complete answer to the point the appellant makes on pages 26 and 27 of its brief, and seeks to sustain by an elaborate statistical note: that most grade crossing elimination statutes provide for notice in advance and an opportunity to be heard; ergo, such notice and hearing must be a constitutional requirement.

In *the Adkins case* also this Court was asked to consider the fact that there were numerous similar statutes and a great body of opinion favoring such legislation. The terse comment of the Court (261 U. S. 559) is applicable to appellant's point:

> "These are all proper enough for the consideration of the lawmaking bodies, since their tendency is to establish the desirability or undesirability of the legislation; but they reflect no legitimate light upon the question of its validity, and that is what we are called upon to decide. The elucidation of that question cannot be aided by counting heads."

**The True Basis of Decision in Health Department v. Trinity Church, 145 N. Y. 32.**

We submit that the effort of our opponents on pages 36 to 38 of their brief to break down the effect of the decision in the case of *Health Department* v. *Trinity Church*, 145 N. Y. 32, 27 L. R. A. 710, and its subsequent approval by this Court in *Chicago, Burlington & Quincy Railroad Company* v. *Nebraska*, 170 U. S. 57, 76, 77,—is altogether futile. It is doubtless possible that the *Trinity Church case* might have arisen and been decided in the manner outlined by our opponents,—that is, under the application of the direct legislation of the State of New York rather than under the discretion delegated to the Board of Health. But the fact is that neither the New York Court in its decision in the case, nor the United States Supreme Court in its interpre-

tation of that decision in the case of *Chi. B. & Q. R. R. Co.* v. *Nebraska*, 170 U. S. 57, took the view that the case so arose. This is demonstrated by the following quotation from the opinion of Judge Peckham in the *Trinity Church case*, at page 713 of the 27 L. R. A. report:

> "The legislature has power, and has exercised it in countless instances, to enact general laws upon the subject of the public health or safety without providing that the parties who are to be affected by those laws shall first be heard before they shall take effect in any particular case. *So far as this objection of want of notice is concerned, the case is not materially altered in principle from what it would have been if the legislature had enacted a general law that all owners of tenement houses should, within a certain period named in the act, furnish the water as directed.* INDEED, THIS ACT DOES CONTAIN SUCH A PROVISION, BUT THE PLAINTIFF HAS NOT PROCEEDED UNDER IT. IF, IN SUCH CASE, THE ENFORCEMENT OF THE DIRECT COMMAND OF THE LEGISLATURE WERE NOT TO BE PRECEDED BY ANY HEARING ON THE PART OF ANY OWNER OF A TENEMENT HOUSE, NO PROVISION OF THE STATE OR FEDERAL CONSTITUTION WOULD BE VIOLATED. *The fact that the legislature has chosen to delegate a certain portion of its power to the board of health*, and to enact that the owners of certain tenement houses should be compelled to furnish this water after the board of health had so directed, WOULD NOT ALTER THE PRINCIPLE, nor would it be necessary to provide that the board should give notice and afford a hearing to the owner before it made such order. I have never understood that it was necessary that any notice should be given under such circumstances before a provision of this nature could be carried out." (Italics and capitals supplied.)

That the case was not interpreted by this Court to have arisen under direct legislation, but under the exercise of the discretion delegated to the board of health, is equally clearly shown by the following from the opinion of Mr.

Justice Shiras in the opinion in the *Chicago, Burlington & Quincy Railroad Co.* v. *Nebraska*, 170 U. S. 57, at page 76:

> "*Health Department* v. *Trinity Church*, 145 N. Y. 32, was the case of an action to recover a penalty under a statute requiring all tenement houses to be supplied with water on each floor occupied or intended to be occupied by one or more families, WHENEVER SO DIRECTED BY THE BOARD OF HEALTH. The statute made no provision for notice to property holders, and none in fact was given, while it was admitted that it would cost the respondent a considerable sum of money to comply with the order of the board." (Capitals supplied.)

Then is quoted by Mr. Justice Shiras that portion of the opinion of Judge Peckham in the Trinity Church case which we have set out above.

It is respectfully submitted that in view of this language of the New York Court in the decision of the case, and by this interpretation plainly placed thereon by this Court, it is idle for our opponents to assert, as they do, that the *Trinity Church case* did not arise and was not decided as arising under the exercise of delegated power; it is idle for them to contend that the *Trinity Church case*, with the stamp of approval of this Court, does not distinctly hold that such discretion may properly be delegated to a board and exercised by that board without affording him upon whom the police regulation impinges, notice and an opportunity to be heard.

However this may be, the admission of appellant that the Commonwealth of Virginia might by direct legislative action eliminate a grade crossing without any notice or opportunity to be heard, is tantamount to an admission that the Commonwealth may accomplish the same result through any other agency without running counter to the requirement of due process of law under the Fourteenth Amendment of the Federal Constitution.

If the power so to act resides anywhere in the sovereignty of the Commonwealth, then it may be exercised by the Commonwealth either by direct legislation or through any subordinate agency it may please. If the power does not reside in the Commonwealth then it cannot be exercised either by the General Assembly of Virginia, or under delegated power by any administrative board or subordinate branch of government. The Fourteenth Amendment in its requirement of due process of law is just as much a restraint upon the General Assembly of Virginia acting directly as it is upon any board to whom it may elect to delegate some portion of its legislative power.

Once admit (as appellant repeatedly does) that the Fourteenth Amendment does not restrain this kind of procedure in this class of cases by the General Assembly, the supreme legislative body of the Commonwealth of Virginia, and it necessarily follows that it does not restrain it when the General Assembly chooses to accomplish the same result by announcing a specific plan and a plain policy, and then delegates to an administrative department discretion, under the legislative guide or standard set up, to ascertain the state of facts upon the existence of which the application of the law is made to depend.

The exercise of the discretion in this case under the legislative guide merely renders the policy potential in the law, as to the particular grade crossing involved, dynamic.

Respectfully submitted,

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CORRECTED COPY

# SUPREME COURT OF THE UNITED STATES.

No. 26.—October Term, 1933.

Southern Railway Company, Appellant, *vs.* Commonwealth of Virginia at the Relation of H. G. Shirley, State Highway Commissioner of Virginia. } Appeal from the Supreme Court of Appeals of the State of Virginia.

[December 4, 1933.]

Mr. Justice McReynolds delivered the opinion of the Court.

This appeal questions the validity of Ch. 62, Acts General Assembly of Virginia, 1930; Michie's Code 1930, Sec. 3974a. Pertinent portions are in the margin.* The claim is that enforcement of the Act as construed by the State Supreme Court, would deprive appellant of property without due process of law and thus violate the XIV Amendment.

Purporting to proceed under the challenged chapter, the Highway Commissioner, without prior notice, advised appellant that

*Ch. 62, Acts General Assembly of Virginia 1930, p. 74. (Michie's Code Sec. 3974a).

" . . . Whenever the elimination of an existing crossing at grade of a State road by a railroad, or a railroad by a State road, and the substitution therefor of an overhead. . . crossing becomes, in the opinion of the State Highway Commissioner, necessary for public safety and convenience, . . . the State Highway Commissioner shall notify in writing the railroad company . . . upon which the existing crossing at grade . . . is, . . . stating particularly the point at which . . . the existing grade crossing is to be eliminated . . . and that the public safety or convenience requires that the crossing be made . . . above . . . the tracks of said railroad, or that the existing grade crossing should be eliminated or abolished, and a crossing constructed above . . . the tracks of said railroad, . . . and shall submit to said railroad company plans and specifications of the proposed work, . . . It shall thereupon be the duty of the railroad company to provide all equipment and materials and construct the overhead . . . crossing, . . . in accordance with the plans and specifications submitted by the State Highway Commissioner, . . . ; provided, however, that if the railroad company be not satisfied with the plans and specifications sub-

in his opinion public safety and convenience required elimination of the grade crossing near Antlers; also, he directed construction there of an overhead passage according to accompanying plans and specifications. Replying, the Company questioned the Commissioner's conclusion upon the facts, denied the validity of the Act, and refused to undertake the work. Thereupon, by petition he asked the State Corporation Commission for an order requiring it to proceed. A demurrer to this questioned the constitutionality of the statute. It especially pointed out that the Commissioner undertook to ordain, without prior notice, and that there was no provision for any review except in respect of the proposed plans for the structure. The Commission overruled the demurrer and directed the Railway to construct the overhead. The Supreme Court construed the statute and approved this action.

As authoritatively interpreted the challenged act permits the Highway Commissioner—an executive officer—without notice or hearing to command a railway company to abolish any designated grade crossing and construct an overhead when, in his opinion, necessary for public safety and convenience. His opinion is final upon the fundamental question whether public convenience and necessity require the elimination unless what the Supreme Court denominates "arbitrary" exercise of the granted power can be

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mitted by the State highway commissioner, such company may within sixty days after the receipt of said plans and specifications, if the railroad company and the State Highway Commissioner be unable in the meantime to agree on plans and specifications, including the grade of the approaches and the point to which the liability of the railroad shall extend, file a petition with the State corporation commission setting out its objections to the plans and specifications and its recommendations of plans and specifications in lieu thereof, and the commission shall hear the complaint as other complaints are heard and determined by that body, and shall approve the plans submitted by the State Highway Commissioner, or other plans in lieu thereof; and it shall thereupon be the duty of the railroad company to provide all equipment and materials and construct, widen, strengthen, remodel, redesign, relocate or replace, as the case may be, the overhead or underpass crossing, or provide a new or improved structure in lieu thereof, within its right of way limits, and the State Highway Commissioner the portion outside of the railroad right of way, unless otherwise mutually agreed upon, in accordance with the plans and specifications approved by the State corporation commission.

"Upon completion of the work, . . . the costs are to be divided between the state and the railroad," etc.

shown. Upon petition, filed within sixty days, the Corporation Commission may consider the proposed plans and approve or modify them, but nothing more. The statute makes no provision for review by any court. But the Supreme Court has declared that a court of equity may give relief under an original bill where "arbitrary" action can be established.

As construed and applied, we think the statute conflicts with the XIV Amendment.

Certainly, to require abolition of an established grade crossing and the outlay of money necessary to construct an overhead would take the railway's property in a very real sense. This seems plain enough both upon reason and authority. *Washington, ex rel. Oregon R. R. & N. Co.* v. *Fairchild,* 224 U. S. 510, 523, 524; *Great Northern Ry. Co.* v. *Minnesota,* 238 U. S. 340, 345. See *Chicago, Milwaukee & St. Paul Ry. Company* v. *Board Commissioners,* 76 Mont. 305.

If we assume that by proper legislation a State may impose upon railways the duty of eliminating grade crossings, when deemed necessary for public safety and convenience, the question here is whether the challenged statute meets the requirements of due process of law. Undoubtedly, it attempts to give an administrative officer power to make final determination in respect of facts—the character of a crossing and what is necessary for the public safety and convenience—without notice, without hearing, without evidence; and upon this *ex parte* finding, not subject to general review, to ordain that expenditures shall be made for erecting a new structure. The thing so authorized is no mere police regulation.

In *Interstate Commerce Commission* v. *Louisville & Nashville R. R.,* 227 U. S. 88, 91, replying to the claim that a Commission's order made without substantial supporting evidence was conclusive, this Court declared—

"A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our Government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficiently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.

"In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi-judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair, if the finding was contrary to the 'indisputable character of the evidence'."

*Chicago, Milwaukee & St. Paul Ry. Co.* v. *Minnesota,* 134 U. S. 418, 457, 458, involved an act of the Minnesota legislature, which permitted the Commission finally to fix railway rates without notice. It was challenged because of conflict with the due process clause. This Court said:

> "It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice. . . . "No hearing is provided for, no summons or notice to the company before the commission has found what it is to find and declared what it is to declare, no opportunity provided for the company to introduce witnesses before the commission, in fact, nothing which has the semblance of due process of law; . . . .
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> "The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; . . . ."

The claim that the questioned statute was enacted under the police power of the State and, therefore, is not subject to the standards applicable to legislation under other powers, conflicts

with the firmly established rule that every State power is limited by the inhibitions of the XIV Amendment. *Chicago, Milwaukee, St. Paul & Pacific R. R. Co.* v. *Tompkins*, 176 U. S. 167; *Eubank* v. *Richmond*, 226 U. S. 137, 143; *Adams* v. *Tanner*, 244 U. S. 590, 594; *Adkins* v. *Children's Hospital*, 261 U. S. 525, 549, 550.

*Lawton* v. *Steele*, 152 U. S. 133, points out that the right to destroy private property—nuisances &c.—for protection against imminent danger, has long been recognized. Such action does no violence to the XIV Amendment. The principles which control have no present application. Here, the statute itself contemplates material delay; no impending danger demands immediate action. During sixty days the railway may seek modification of the plans proposed.

Counsel submit that the Legislature, without giving notice or opportunity to be heard, by direct order might have required elimination of the crossing. Consequently, they conclude the same end may be accomplished in any manner which it deems advisable without violating the Federal Constitution. But if we assume that a state legislature may determine what public welfare demands and by direct command require a railway to act accordingly, it by no means follows that an administrative officer may be empowered, without notice or hearing, to act with finality upon his own opinion and ordain the taking of private property. There is an obvious difference between legislative determination and the finding of an administrative official not supported by evidence. In theory, at least, the legislature acts upon adequate knowledge after full consideration and through members who represent the entire public.

Chapter 62 undertakes to empower the Highway Commissioner to take railway property if and when he deems it necessary for public safety and convenience. It makes no provision for a hearing, and grants no opportunity for a review in any court. This, we think, amounts to the delegation of purely arbitrary and unconstitutional power unless the indefinite right of resort to a court of equity referred to by the court below affords adequate protection.

Considering the decisions here, it is clear that no such authority as that claimed for the Commissioner could be entrusted to an administrative officer or body under the power to tax, to impose assessments for benefits, to regulate common carriers, to establish drainage districts, or to regulate business. *Turner* v. *Wade*, 254

U. S. 64, 70; *Browning* v. *Hooper,* 269 U. S. 396, 405; *Interstate Commerce Commission* v. *Louisville & Nashville R. R.,* 227 U. S. 88; *Embree* v. *Kansas City Road District,* 240 U. S. 242, 247; *Yick Wo* v. *Hopkins,* 118 U. S. 356. Appellee makes no claim to the contrary. He affirms, however, that under the police power the legislature could rightly grant the challenged authority. But, as pointed out above, this is subject to the inhibitions of the XIV Amendment and we think the suggested distinction between it and other powers of the state is unsound.

This Court has often recognized the power of a state acting through an executive officer or body to order the removal of grade crossings, but in all these cases there was the right to a hearing and review by some court. See *Great Northern Ry.* v. *Clara City,* 246 U. S. 434; *Erie R. R. Co.* v. *Public Utilities Commissioners,* 254 U. S. 394; *Lehigh Valley Co.* v. *Board of Commissioners,* 278 U. S. 24.

After affirming appellant's obligation to comply with the Commissioner's order, the court below said—"The railroad is not without remedy. Should the power vested in the Highway Commissioner be arbitrarily exercised, equity's long arm will stay his hand". But by sanctioning the order directing the Railway to proceed it, in effect, approved action taken without hearing, without evidence, without opportunity to know the basis therefor. This was to rule that such action was not necessarily "arbitrary". There is nothing to indicate what that court would deem arbitrary action or how this could be established in the absence of evidence or hearing. In circumstances like those here disclosed no contestant could have fair opportunity for relief in a court of equity. There would be nothing to show the grounds upon which the Commissioner based his conclusion. He alone would be cognizant of the mental processes which begot his urgent opinion.

The infirmities of the enactment are not relieved by an indefinite right of review in respect of some action spoken of as arbitrary. Before ~~it properly~~ can be taken under the edict of an administrative officer the appellant is entitled to a fair hearing upon the fundamental facts. This has not been accorded. The judgment below must be reversed. The cause will be remanded for further proceedings not inconsistent with this opinion.

*Reversed.*

# SUPREME COURT OF THE UNITED STATES.

No. 26.—October Term, 1933.

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| Southern Railway Co., Appellant, *vs.* Virginia *ex rel.* Shirley, State Highway Comr. | Appeal from the Supreme Court of Appeals of the State of Virginia. |

[December 4, 1933.]

The Chief Justice, Mr. Justice Stone and Mr. Justice Cardozo dissent upon the ground that there has been a lawful delegation to the State Highway Commissioner of the power to declare the need for the abatement of a nuisance through the elimination of grade crossings dangerous to life and limb; that this power may be exercised without notice or a hearing (*Chicago, B. & Q. R. R. Co.* v. *Nebraska*, 170 U. S. 57, 77), provided adequate opportunity is afforded for review in the event that the power is perverted or abused; and that such opportunity has been given by the statutes of Virginia as construed by its highest court.